

TODAY'S LAW AND YESTERDAY'S CRIME: RETROACTIVE APPLICATION OF AMELIORATIVE CRIMINAL LEGISLATION

I. INTRODUCTION

It is a general rule that statutes operate prospectively.¹ The basis for the rule is judicial and legislative concern that retroactive laws² are characterized by lack of notice, inadequate consideration of past conditions, and disruption of the security attaching to the finalization of past transactions.³ In the criminal law the *ex post facto* clauses of the United States Constitution⁴ "forbid the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."⁵ There is, however, no constitutional limitation on retroactive application of criminal legislation which mollifies criminal sanctions.

This Comment focuses on the retroactive application of legislative changes which redefine criminal conduct or reduce the penalty for criminal behavior. The problem is that of the treatment afforded an individual who commits a criminal act prior to a mitigatory change which precedes his apprehension, trial, or completion of sentence. This Comment will therefore discuss the common law doctrine of abatement, the rise of legislative general and specific saving statutes, and the interplay between these two approaches, and will suggest a resolution of the difficulties created thereby.⁶

¹ 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2201 (3d ed. F. Horack 1943); see, e.g., PA. STAT. ANN. tit. 46, §556 (1969).

² "A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (footnote omitted).

³ See Smead, *The Rule Against Retroactive Legislation; A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936); Smith, *Retroactive Laws and Vested Rights* (pt. 1), 5 TEXAS L. REV. 231 (1927), (pt. 2), 6 TEXAS L. REV. 409 (1928).

⁴ U.S. CONST. art. I, § 9, cl. 3; §10, cl. 1.

⁵ *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The classic definition of an *ex post facto* law appears in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in the original):

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

⁶ This Comment does not consider treatment of constitutional change either in terms of constitutional repeal by the legislature or judicial decisions affecting the constitutionality of criminal laws. For discussion of the former, see *United States v. Chambers*, 291 U.S. 217 (1934). For the latter, see Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

The volume of legislative changes in the criminal law is perhaps best illustrated by the almost universal legislative reconsideration of laws relating to possession and use of marijuana in recent years. As of August, 1971, forty-two states had amended their marijuana statutes within the previous three years.⁷ Since then, twenty-seven state legislatures have again reconsidered their marijuana laws.⁸ A question raised by each amendment is its effect upon violations of the previous law. Similarly, the same question implicitly is raised by proposals for new codifications of the criminal codes, as is the case currently with federal law,⁹ in which a wide range of crimes previously committed within a particular jurisdiction may be affected.

As long as criminal laws are changed, their applicability will be an issue. This issue is as ancient as the roots of the common law; its appreciation therefore begins with the historical development of the common law doctrine of abatement.

II. THE DOCTRINE OF ABATEMENT

At common law, the unqualified repeal¹⁰ of a criminal statute resulted in the abatement of all prosecutions which had not been made final.¹¹ The origins of the doctrine are traceable to statements made by

⁷ See 9 CRIM. L. REP. 2443-44 (1971).

⁸ Compare *id.* with ALA. CODE tit. 22, §§ 258(25)-(60) (Supp. 1971); ARIZ. REV. STAT. ANN. §§ 36-1001 to -1020 (Supp. 1971), as amended, (Supp. July, 1972); CAL. HEALTH & SAFETY CODE §§ 11,530-33 (West 1964), as amended, (Supp. 1971); COLO. REV. STAT. ANN. §§ 48-5-1 to -21 (1963), as amended, (Supp. 1972); CONN. GEN. STAT. ANN. §§ 19-443 to -485 (1969), as amended, (Supp. 1972); FLA. STAT. ANN. §§ 398.01-24 (1960), as amended, (Supp. 1972); IDAHO CODE §§ 37-2701 to -2751 (Supp. 1971), ILL. ANN. STAT. ch. 56½, §§ 701-19 (Smith-Hurd Supp. 1972); IND. ANN. STAT. §§ 10-3519 to -3557 (1956), as amended, (Supp. 1972); Ch. 226, [1972] Ky. Acts (to be codified at Ky. REV. STAT. ANN. §§ 218A.010-990); LA. REV. STAT. ANN. §§ 40.961-.90 (Supp. 1972); ME. REV. STAT. ANN. tit. 22, §§ 2381-86 (Supp. 1972); MD. ANN. CODE art. 27, §§ 276-302 (1971), as amended, (Supp. 1971); MASS. GEN. LAWS ANN. ch. 94C, §§ 1-48 (Supp. 1971); MICH. COMP. LAWS ANN. §§ 335.301-367 (Supp. 1972); Ch. 878, [1972] N.Y. Acts; N.C. GEN. STAT. §§ 90-86 to -113.8 (Supp. 1971); OHIO REV. CODE ANN. §§ 3719.01-99 (1971), as amended, (Supp. 1971); OKLA. STAT. ANN. tit. 63, §§ 2-101 to -610 (Supp. 1972); Act No. 64 (Pa. Legis. Serv. 165 (1972)); R.I. GEN. LAWS ANN. §§ 21-28-1 to -68 (1968), as amended, (Supp. 1971); S.D. COMPILED LAWS ANN. §§ 39-17-44 to -155 (Supp. 1972); TEX. PEN. CODE art. 725b (Supp. 1972); VT. STAT. ANN. tit. 18, §§ 4201-25 (1968), as amended, (Supp. 1972); VA. CODE ANN. §§ 54-524.1-109 (1972), as amended, (Supp. 1972); WASH. REV. CODE ANN. §§ 69.50.101-608 (Supp. 1971); WIS. STAT. ANN. §§ 161.001-62 (Supp. 1972).

⁹ See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) (A Proposed New Federal Criminal Code).

¹⁰ For present purposes, an unqualified repeal is defined as a repeal without express language that pending prosecutions and liability for past violations will not be extinguished.

¹¹ Regina v. Mawgan, 112 Eng. Rep. 927 (Q.B. 1838). See Bell v. Maryland, 378 U.S. 226 (1964), in which the Court stated that the "universal common-law rule" is that "[W]hen the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.

Id. at 230.

Hale¹² and Hawkins¹³ which were in fact unsupported by authority.¹⁴ Though the doctrine has been criticized as lacking reasonable basis and as having been adopted by American courts without consideration or analysis of its social desirability,¹⁵ both criticisms are subject to dispute.¹⁶ Careful analysis of both the early English decisions and the recent American ones, however, clearly reveals that the doctrine of abatement provides a judicially fashioned rule of statutory construction based upon a reasonable presumption of legislative intent, and a guideline which legislatures can use in fashioning repealing acts which will not disturb prosecution for previously proscribed conduct. As Justice Harlan, dissenting in *Hamm v. City of Rock Hill*,¹⁷ observed while reviewing the origins of the doctrine:

The common-law rule of abatement is basically a canon of construction conceived by the courts as a yardstick for determining whether a legislature, which has enacted a statute making conduct noncriminal which was proscribed by an earlier criminal statute, also intended to put an end to nonfinal convictions under the former legislation.¹⁸

The doctrine of abatement was not inexorably applied in civil cases because of judicial concern for vested rights and reliance upon completed transactions.¹⁹ In criminal cases the rule was strictly followed. A statute providing criminal liability for failure to repair certain roads resulted in the indictment of the residents of Denton in *The Queen v.*

¹² "[W]hen an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal unless a special clause in the act of repeal be made enabling such proceeding after the repeal, for offenses committed before the repeal . . ." 1 M. HALE, *PLEAS OF THE CROWN* 291 (G. Wilson ed. 1778).

¹³ 1 W. HAWKINS, *PLEAS OF THE CROWN* 169 (6th ed. T. Leach 1788). "If one commit an offense which is made felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute."

¹⁴ See Levitt, *Repeal of Penal Statutes and Effect on Pending Prosecutions*, 9 A.B.A.J. 715, 716 (1923).

¹⁵ See *id.*; Note, 24 IOWA L. REV. 744 (1939).

¹⁶ See, e.g., *Hamm v. City of Rock Hill*, 379 U.S. 306, 322 (1964) (Harlan, J., dissenting):

In effect, the doctrine of abatement establishes a presumption that such was the purpose of the legislature in the absence of a demonstrated contrary intent This presumption of legislative intent is logical and reasonable because the very act of unqualified repeal imputes to the legislature a determination that the former legislation was no longer socially necessary or desirable. Furthermore, the doctrine of abatement provides impetus for the legislature to consider and expressly indicate its intention to preserve both pending prosecutions for violations of the repealed law and the possibility of future prosecutions for acts proscribed under the repealed law.

For American abatement cases with cogent policy discussions, see cases cited note 30 *infra* & accompanying text.

¹⁷ 379 U.S. 306 (1964).

¹⁸ *Id.* at 322 (Harlan, J., dissenting).

¹⁹ Compare *Hitchcock v. Way*, 112 Eng. Rep. 360 (K.B. 1837), with *Kay v. Goodwin*, 130 Eng. Rep. 1403 (C.P. 1830).

Inhabitants of Denton.²⁰ Prior to trial, the statute was repealed without reference to pending prosecutions. The trial judge applied the repealed statute resulting in conviction of the defendants. In granting an arrest of judgment, Justice Erle stated, "[t]he repealed statute is, with regard to any further operation, as if it had never existed. . . . To say that the proceedings may nevertheless be followed up contravenes the sense of the word 'repeal.'"²¹

As "repeal" also historically includes the situation of repeal and re-enactment with different penalties,²² the doctrine of abatement also was applied to cases in which Parliament reduced the penalty for a particular act. The conduct was still considered criminal, and only the penalty changed, but the doctrine prevented prosecution or punishment under either the older "repealed" law or the new law with lesser penalties, unless the courts were able to find a specific Parliamentary intent to the contrary.

The defendant in *The King v. M'Kenzie*²³ was charged with feloniously stealing lace. Prior to trial the statute providing the death penalty for this offense was repealed, and life imprisonment was substituted as the penalty in the subsequent re-enactment. The court was troubled by the question of which statute applied and held that neither could be applied since the wording of the latter statute indicated a legislative intent that it operate prospectively, and, because of the doctrine of abatement, the repealed statute could not sustain the prosecution.²⁴ In the absence of the doctrine of abatement, the defendant would upon conviction have been sentenced to death. Instead, he was convicted of a non-statutory crime with a lesser penalty—common law larceny.²⁵

In *Rex v. Davis*,²⁶ a statute providing the death penalty for killing deer was repealed by implication²⁷ after the defendant had committed the offense but before trial. The new statute reduced the offense from a felony to a misdemeanor punishable only by fine. The court ruled that the defendant was subject to punishment under the current statute, finding a legislative intent that it operate retroactively.

²⁰ 118 Eng. Rep. 287 (Q.B. 1852).

²¹ *Id.* at 291.

²² See 1 J. SUTHERLAND, *supra* note 1, § 2031 n.2.

²³ 168 Eng. Rep. 881 (K.B. 1820).

²⁴ The court cited Hale for this proposition; see note 12 *supra*.

²⁵ *Cf.* *Beard v. State*, 74 Md. 130, 21 A. 700 (1891).

²⁶ 168 Eng. Rep. 238 (K.B. 1785).

²⁷ In general, repeal by implication is inferred where there is irreconcilable conflict between statutes. Note, *Repeal By Implication*, 55 COLUM. L. REV. 1039, 1043 (1955). *Cf.* 1 J. SUTHERLAND, *supra* note 1, §§ 2012-36; Note, 37 COLUM. L. REV. 292 (1937). See also *Flaherty v. Thomas*, 94 Mass. (12 Allen) 428, 434 (1866):

Former laws indeed are not repealed by implication, except so far as they are inconsistent with a later statute. This inconsistency may arise either from a new enactment which covers the whole subject, or from a statute which simply imposes a new punishment, whether greater or less in degree, for the same kind of crime.

The principle which emerges from cases such as these is that the courts, when faced with silence or ambiguity, were endeavoring to find and implement the intent of the legislature. That intent could variously be found as one of total repeal, of continued vitality of the superseded statute, of application of only new definitions and new penalties, even to the extent of *ex post facto* application of new or more stringent penalties or crimes, as, during this formative era, Parliament's power to pass laws with retroactive effect was unquestioned.²⁸ Yet equally important as an established rule of construction at the time was that "no law should be given an operation from a time prior to its enactment unless Parliament had expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to this past time."²⁹

Parliament, thus permitted to pass laws of retroactive application but required to state its purpose clearly, could easily indicate its intention that offenses committed under repealed or modified statutes be punished; this intention would be followed by the courts. Under these circumstances, as a matter of policy, the doctrine of abatement worked no injustices unless the legislature was careless—a risk the courts evidently were willing to accept—and the doctrine prevented the senseless punishment of persons whose conduct was no longer considered by the legislature to be wrongful and worthy of condemnation.³⁰

First applied in the United States by the Supreme Court in admiralty cases involving forfeitures,³¹ the doctrine of abatement was quickly applied to criminal cases as well,³² but its application was considerably more troublesome to the American judiciary than to the English. One difficulty was the interplay of the Constitution's *ex post facto* clauses³³ and the doctrine of abatement. If a legislature amended or repealed, either expressly or by implication, and re-enacted a criminal statute

²⁸ See Seeman, *The Retroactive Effect of Repeal Legislation*, 27 Ky. L.J. 75 (1938); Smead, *supra* note 3, at 778.

²⁹ Smead, *supra* note 3, at 778 (footnotes omitted).

³⁰ For an early statement of this policy by the American judiciary, see *State v. Cole*, 13 S.C.L. (2 McCord) 1 (1822), in which the court stated:

The reason of the law is obvious; it is not only unwise and impolitic, but it is unjust to punish a man for the commission of an act which the law no longer considers as an offence. The policy of a country may require the prohibition of certain acts, or the performance of certain duties for a time, after which, the acts may be innocent, and the duties not required. It would not be less absurd to punish a man for an act which is not illegal at the time the punishment is inflicted, than to punish him for one which never has been declared illegal . . .

Id. at 2. See also *State v. King*, 63 La. 593 (1857); *Flaherty v. Thomas*, 94 Mass. (12 Allen) 428 (1866).

³¹ See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

³² See *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1870) (discussed at note 37 *infra*); *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851) (statute providing for penalty repealed by implication); *cf. United States v. Passmore*, 4 U.S. (4 Dall.) 372, 1 Fed. Cas. 1032 (No. 475) (C.C.D. Pa. 1804) (defendant acquitted of perjury under a bankruptcy act which was repealed with a saving clause not covering criminal offenses under the act).

³³ U.S.CONST. art. I, § 9, cl. 3; § 10, cl. 1.

without a saving clause,³⁴ in situations in which the new statute provided for an increase in penalty or broadened the scope of prohibited conduct, a violator of the former act could not be convicted under either statute. Conviction under the former statute was precluded by the doctrine of abatement. Conviction under the current statute was constitutionally impossible because the current act would be an *ex post facto* law as applied to the violator.

In *Lindzey v. State*,³⁵ the defendant was tried and convicted of carrying a concealed weapon. After indictment, but before conviction, the statute was amended without a saving clause. The amended statute provided for a minimum fine of twenty-five dollars where no such minimum existed previously, and eliminated the defense of apprehension of attack. The court held that the conviction had to be vacated and the defendant discharged since, due to the abatement doctrine, he could not be punished under the former statute, and prosecution based on the amended version would have been constitutionally repugnant.³⁶ Similarly, in *United States v. Tynen*³⁷ the defendant was indicted for forgery of citizenship papers. The defendant demurred to the sufficiency of the indictment and the circuit court certified the question to the Supreme Court. While the case was pending in the Supreme Court, a new act passed which encompassed the entire field of frauds against the naturalization laws and which, while reducing some penalties, increased others.³⁸ The Court held that while there was no express repeal of the earlier act, "if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."³⁹ The first act having been repealed without a saving clause, the doctrine of abatement prevented continuation of the prosecution. The new act could not be given retroactive effect due to the *ex post facto* clauses and because its wording was prospective in any event.⁴⁰

In American cases in which penalties were lessened, the abatement

³⁴ A saving clause refers to any language that would "save" pending prosecutions or future prosecutions for acts committed under the repealed statute from being abated.

³⁵ 65 Miss. 542 (1888).

³⁶ The amended statute was *ex post facto* because it eliminated the defense of apprehension of attack, making criminal that which was not so under the former statute, and because it changed, but did not mitigate, the punishment. *Id.* at 545.

³⁷ 78 U.S. (11 Wall.) 88 (1870).

³⁸ The new act reduced the minimum fine and minimum term of imprisonment, but allowed for punishment by both fine and imprisonment; the former act specified either punishment, but not both. *See id.* at 92-93.

³⁹ *Id.* at 92.

⁴⁰ *See also* Walker v. Commonwealth, 192 Ky. 257, 232 S.W. 617 (1921); Flaherty v. Thomas, 94 Mass. (12 Allen) 428 (1866); People v. Lowell, 250 Mich. 349, 230 N.W. 202 (1930); Hartung v. People, 22 N.Y. 95 (1860); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889); Calkins v. State, 14 Ohio St. 222 (1863); State v. Meader, 62 Vt. 458, 20 A. 730 (1890); Commonwealth v. Leftwich, 26 Va. (5 Rand.) 657 (1827); State v. Campbell, 44 Wis. 529 (1878). *But see* Dolan v. Thomas, 94 Mass. (12 Allen) 421 (1866) (a new law authorizing decreased punishment results in the conviction being saved and the lesser punishment being applied); State v. Perkins, 141 N.C. 797, 53 S.E. 735 (1906).

doctrine operated as it did in England. In *Commonwealth v. Kimball*,⁴¹ for example, the defendant was convicted of selling liquor without a license. While his appeal was pending the statute was repealed by implication due to the passage of another statute prohibiting the same conduct. The latter statute provided for a fine of between ten and twenty dollars while the former provided for a twenty-dollar fine. The court held that the defendant was entitled to arrest of judgment since the former penalty had been repealed by the latter statute in the absence of a saving clause. Similar results were also found in cases of express repeal and prospective re-enactment with lower penalties. Judgment was arrested on appeal and a convicted defendant was discharged in *State v. Daley*⁴² because, before the defendant's trial, the legislature had expressly repealed the manslaughter statute and replaced it with a prospective statute with lesser penalties.⁴³ In this situation the legislature could have used a saving clause in the repealing statute or provided that the new statute apply to outstanding violations of the repealed statute. Had the latter device been used, it would not have violated the *ex post facto* clauses because punishment would have been mitigated.⁴⁴

The last major type of case in which the abatement doctrine has been exercised is that in which an attempt by the legislature to use a specific saving clause failed. For example, the Iowa legislature in 1843 repealed the murder provision of the 1839 Code, but included a saving clause. The 1843 Code, however, was repealed by the 1851 Code, which had a saving clause relating only to the 1843 Code. Nothing was expressed in regard to the old 1839 Code or its murder provision. As a result, the defendant in *Jones v. State*⁴⁵ was discharged after an 1855 conviction for a murder committed in 1840, and the conviction abated because of legislative oversight.⁴⁶

Thus, despite an express concern that the legislature's intent be followed, abatement applied as a rule of construction led to injustice and the actual thwarting of legislative purpose when lawmakers ig-

⁴¹ 38 Mass. (21 Pick.) 373 (1838).

⁴² 29 Conn. 272 (1860).

⁴³ *Id.* at 275-76. See also *Higginbotham v. State*, 19 Fla. 557 (1882) (no saving clause; conviction reversed); *State v. Henderson*, 64 La. 489 (1858) (same); *State v. King*, 63 La. 593 (1857) (verbatim re-enactment without saving clause; conviction reversed); *State v. Allen*, 14 Wash. 103, 44 P. 121 (1896) (no saving clause).

⁴⁴ See *Greer v. State*, 22 Tex. 588 (1858) (suggesting that a new statute, if mitigating punishment, could apply retroactively).

⁴⁵ 1 Iowa 395 (1855).

⁴⁶ There are, however, a number of cases in which the intention to grant a legislative pardon coincides with the omission of a saving clause; in such cases abatement prevents punishment when punishment could serve no legislative purpose. These cases are characterized by expressed repeals without re-enactment and primarily involve minor offenses. See, e.g., *Carlisle v. State*, 42 Ala. 523 (1868); *Heald v. State*, 36 Me. 62 (1853); *Smith v. State*, 45 Md. 49 (1876); *Keller v. State*, 12 Md. 322 (1858); *Lewis v. Foster*, 1 N.H. 61 (1817); *Commonwealth v. Caravella*, 113 Pa. Super. 263, 173 A. 828 (1934); *State v. Fletcher*, 1 R.I. 193 (1846); *State v. Spencer*, 177 S.C. 346, 181 S.E. 217 (1935).

nored the doctrine.⁴⁷ This contradiction between theory and reality was acknowledged by the courts faced with the problem. Chief Justice Shaw, in defending the decision in *Commonwealth v. Kimball*,⁴⁸ stated:

The result may or may not be conformable to the actual intent of those who passed the latter statute. We can only ascertain the legal intent of the legislature, by the language which they have used, applied and expounded conformably to the settled and well known rules of construction.⁴⁹

The solution to legislative inadvertance was devised in the legislatures in the form of general saving legislation applicable to all repeals, amendments, or re-enactments,⁵⁰ and the consequent shifting of the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction.

III. LEGISLATIVE RESPONSE: GENERAL SAVING STATUTES

Forty-two states currently have general saving statutes which apply to criminal prosecutions,⁵¹ many of which are part of the state

⁴⁷ See, e.g., *State v. Henderson*, 64 La. 489 (1858); *State v. King*, 63 La. 593 (1857); *Commonwealth v. Marshall*, 28 Mass. (11 Pick.) 350 (1831).

⁴⁸ 38 Mass. (21 Pick.) 373 (1838); see text accompanying note 41 *supra*.

⁴⁹ 38 Mass. at 376-77.

⁵⁰ The history of legislation . . . shows that through the inattention, carelessness and inadvertence of the law-making body crimes and penalties have been abolished, changed or modified after the commission of the offense and before trial in such material way as to effect many legislative pardons. To prevent such mistakes and miscarriages of justice many of the states have enacted general saving statutes.

La Porte v. State, 14 Ariz. 530, 533, 132 P. 563, 564-65 (1913).

For further examples of the application of general saving statutes, see *United States v. Barr*, 24 F. Cas. (No. 14,527) (D.C. Ore. 1877); *Simborski v. Wheeler*, 121 Conn. 195, 183 A. 688 (1936); *Sigsbee v. State*, 43 Fla. 524, 30 So. 816 (1901); *Jackson v. State*, 12 Ga. 1 (1852); *Bell v. State*, 236 Md. 356, 204 A.2d 54 (1964); *Richardson v. State*, 43 Tenn. 122 (1866). See generally Million, *Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder*, 24 ORE. L. REV. 25 (1944); Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 TEXAS L. REV. 285 (1955).

⁵¹ ALA. CODE tit. 1, § 11 (1960); ALASKA STAT. § 01.10.100 (Supp. 1964); ARIZ. REV. STAT. ANN. §§ 1-246, 1-247, 1-249 (1956); ARK. STAT. ANN. § 1-103 (1956); CAL. GOV'T CODE § 9608 (West 1966); COLO. REV. STAT. ANN. §§ 135-1-7, 135-4-7 (1963); CONN. GEN. STAT. REV. §§ 1-1, 54-194 (1958); HAWAII REV. LAWS §§ 1-10, 1-11 (1968); IDAHO CODE 67-513 (1947); ILL. REV. STAT. ch. 131, § 4 (1969); IND. ANN. STAT. §§ 1-303, 1-307 (1967); IOWA CODE § 4.1 (1966); KAN. STAT. ANN. § 77-201 (1969); KY. REV. STAT. § 446.110 (1962); LA. REV. STAT. § 24.171 (1950); ME. REV. STAT. ANN. tit. 1, § 302 (1964); MD. ANN. CODE art. 1, § 3 (1957); MASS. ANN. LAWS ch. 4, § 6 (1966); MICH. COMP. LAWS § 8.4a (1948); MINN. STAT. ANN. § 645.35 (1947); MISS. CODE ANN. §§ 2608, 2609 (1942); MO. ANN. STAT. § 1.160 (1969); MONT. REV. CODES ANN. § 43-514 (1947); NEB. REV. STAT. § 49-301 (1968); NEV. REV. STAT. §§ 169.235, 193.130 (1968); N.H. REV. STAT. ANN. §§ 21.37, 21.38 (1970); N.J. STAT. ANN. § 1:1-15 (1937); N.Y. GEN. CONSTR. LAW §§ 93, 94 (McKinney 1951); N.D. CENT. CODE § 1-02-17 (1959); OHIO REV. CODE ANN. § 1:58 (Supp. 1971); [1971] Ore. Laws ch. 743, § 5(4); R.I. GEN. LAWS ANN. § 43-3-23 (1970); S.D. COMPILED LAWS ANN. § 2-14-18 (1967); TENN. CODE ANN. § 1-301 (1971); TEX. PENAL CODE arts. 13-16 (1952); UTAH CODE ANN. § 68-3-5 (1953); VT. STAT. ANN. tit. 1, § 214 (1972); VA. CODE ANN. § 1-16 (1966); WASH. REV. CODE ANN. § 10.01.040 (1961); W. VA. CODE ANN. § 2-2-8 (1971); WIS. STAT. § 990.04 (1969); WYO. STAT. ANN. § 8-21 (1957).

general statutory construction law, and three states have saving clauses embodied in their constitutions.⁵² A federal general saving statute was enacted in 1871⁵³ in connection with a codification of federal law under the supervision of House and Senate Committees on the Revision of the Laws.⁵⁴ While the extremely sparse legislative history⁵⁵ gives no indication that Congress was aware of similar statutes existing in some states at that time, it can be reasonably concluded, due to the similarities in wording, that the drafters of the federal statute were aware of the earlier state statutes⁵⁶ and the difficulties which had arisen in the absence of a general saving statute.⁵⁷

Despite variations in wording and content, all the statutes are essentially composed of combinations of a few basic provisions. The majority of the statutes apply in both civil and criminal actions, in which the most widely used provision is a statement that a legislative change in a statute will not extinguish penalties, rights, or liabilities accrued or incurred under the original law.⁵⁸ An alternate provision found in statutes relating solely to criminal prosecutions states that offenses and acts previously committed shall be punished as if the law had not been amended or repealed.⁵⁹ Some statutes are expressly limited in their application to repeals⁶⁰ while others specify repeal or

⁵² FLA. CONST. art. 10, § 9; N.M. CONST. art. 4, § 33; OKLA. CONST. art. 5, § 54. *But cf.* United States v. United States Coin & Currency, 401 U.S. 715, 737 n.2 (1971) (White, J., dissenting). The codes in 3 states have saving provisions specifically applicable only to crimes in prior codifications. *See* DEL. CODE ANN. tit. 1, § 104 (1953); GA. CODE ANN. § 26-103 (Supp. 1971); N.C. GEN. STAT. §§ 164-4, 164-5 (1972). Citations hereinafter which refer to a state alone shall refer to the appropriate statutory or constitutional provision unless otherwise indicated.

⁵³ Act of Feb. 25, 1871, c. 71, § 4, 16 Stat. 432. In substance the act is now codified at 1 U.S.C. § 109 (1971), which provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

⁵⁴ *See* MacKenzie, Hamm v. City of Rock Hill and the Federal Savings Statute, 54 GEO. L.J. 173, 175 (1965).

⁵⁵ CONG. GLOBE, 41st Cong., 2d Sess. 2464, 2465 (1870); CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871).

⁵⁶ *See, e.g.*, Act of Dec. 21, 1846, § 1, at 93, Laws of Arkansas (now ARK. STAT. ANN. § 1-103 (1956)); Act of June 17, 1869, ch. 410, Mass. Acts & Resolves (now MASS. ANN. LAWS ch. 4, § 6 (1966)); Gen. Stat. Minn. (1866) ch. 4, § 3 (now MINN. STAT. ANN. § 645.35 (1947)); Mo. Rev. Stat. (1835) at 385, § 37 (now MO. ANN. STAT. § 1.160 (1969)).

⁵⁷ *See* notes 35-49 *supra* and accompanying text.

⁵⁸ Ala., Colo., Conn., Ill., Iowa, Kan., Ky., La., Me., Md., Mich., Minn., N.J., N.Y., Ohio, Okla., S.D., Tenn., Utah, Vt., Va., Wis.

⁵⁹ Ala., Ark., Cal., Fla., Idaho, Ind., Mass., Miss., Mo., Mont., Nev., N.M., N.D., Ore., Wash., W. Va.

⁶⁰ Ark., Conn., Hawaii, Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Mass., Mich., Minn., Mont., Neb., N.H., N.M., N.Y., N.D., Okla., R.I., S.D., Tenn., Utah, Va., W. Va., Wis.

amendment.⁶¹ A minority of the statutes include provisos that prior law shall apply "unless the repealing, revising, amending or altering law shall otherwise expressly provide."⁶² Even without express authority under the saving statutes, however, the legislatures would retain the power to negate specifically the effects of the general saving statute. On the other hand, crimes in Florida, New Mexico, and Oklahoma are totally and absolutely removed from the effects of abatement; their saving clauses are constitutionally mandated, and omit the "unless otherwise provided" clause.⁶³ The legislature in each of those states is powerless to lessen penalties for past transgressions; to do so would require constitutional revision.

Other variations may be found in lesser numbers. In five states, only pending prosecutions are saved by the general saving statute.⁶⁴ In these states, in the absence of a specific saving clause, the repeal of a criminal statute precludes conviction of offenders who have not been apprehended by the time of the repeal or amendment.⁶⁵ In a number of jurisdictions, if a change in the law mitigates the former punishment, the lower penalty may be imposed either at the defendant's election,⁶⁶ or with his consent,⁶⁷ at the court's election,⁶⁸ or automatically.⁶⁹ The mitigation in these states is available only if exercised at the trial stage; an ameliorative change in penalty while the case is on appeal would not inure to the benefit of the appellant.⁷⁰

The Arizona, Texas, and North Dakota statutes are unique. The Arizona saving statutes are applicable only in situations in which there is a repeal followed by re-enactment with changed penalties. The elaborately detailed Texas statutory scheme addresses separately the questions of, and has different rules regarding, modification,⁷¹ repeal,⁷² changed penalties,⁷³ and changed definitions of offenses.⁷⁴ Under Texas law, if the penalty is increased by a subsequent law, the accused is punished under the previous law, obviating the *ex post facto* prob-

⁶¹ Ala., Alas., Cal., Colo., Fla., Md., Miss., Mo., Nev., N.J., Ohio, Ore., Vt., Wash., Wyo.

⁶² Ala., Ark., Cal., Colo., Conn., Idaho, La., Md., Mich., Miss., Mont., Nev., N.J., N.Y., N.D., Ohio, S.D., Wash., Wis., Wyo. The exact language of such provisos varies among these states.

⁶³ See note 52 *supra*.

⁶⁴ Hawaii, Neb., N.H., R.I., Wyo.

⁶⁵ Cf. *State v. Lewis*, 91 R.I. 110, 161 A.2d 209 (1960).

⁶⁶ Ala.

⁶⁷ Ill., Ky., Va., W. Va.

⁶⁸ Miss.

⁶⁹ Mo., Ohio, Vt.

⁷⁰ See, e.g., *Harrison v. State*, 21 Ala. App. 190, 106 So. 511 (1925); *People v. Lisle*, 390 Ill. 327, 61 N.E.2d 381 (1945); *Jones v. Commonwealth*, 104 Ky. 468, 47 S.W. 328 (1898); *State v. Lewis*, 273 Mo. 518, 201 S.W. 80 (1918).

⁷¹ TEX. PEN. CODE art. 13 (1952).

⁷² *Id.* art. 14.

⁷³ *Id.* art. 15.

⁷⁴ *Id.* art. 16.

lems.⁷⁵ If the penalty is mitigated, the defendant may elect either penalty.⁷⁶ If a statute is repealed and no penalty is substituted in the repealing statute, all violators of the repealed law are exempt from punishment unless their convictions have been finalized prior to the repeal.⁷⁷ In essence, this section codifies the common law doctrine of abatement in terms of the policy it was originally intended to serve.⁷⁸ The North Dakota general saving statute was a verbatim enactment of the original federal statute until 1939 when North Dakota amended it.⁷⁹ The intent of the 1939 amendment was to extinguish all jail or prison sentences imposed under repealed laws unless the repealing act expressly provided that the penalties should remain in force. In a habeas corpus proceeding, the court in *In re Chambers*⁸⁰ held that the amendment was invalid insofar as its attempt to extinguish the sentences of persons who had been convicted in a trial court was in derogation of the exclusive power to pardon vested in the governor and the board of pardons under the North Dakota constitution.

The Arizona, Texas, and unsuccessful North Dakota statutory schemes all indicate a legislative recognition that a general saving clause applicable to all repeals and all amendments can produce the same degree of injustice and perversion of the legislature's true desire—the solution the legislature would advance if it actually were asked—that fostered the general saving clauses.⁸¹ "Technical abatement"⁸² was the result of legislative inadvertence and omission, and the result was unpunished criminality. Legislative failure to take into account the general saving statute can lead to a similar result with less of a policy justification—the unintended punishment of conduct that is no longer criminal.⁸³ The presumption of intent written into the codes is too simple and rigid,⁸⁴ and the resolution of its perplexing simplicity is the task of the courts which must enforce it.

⁷⁵ See *Jones v. State*, 132 Tex. Crim. 445, 104 S.W.2d 871 (1937).

⁷⁶ TEX. PEN. CODE arts. 13, 15 (1952).

⁷⁷ *Id.* art. 14; see *Volney v. State*, 91 Tex. Crim. 238, 238 S.W. 220 (1922).

⁷⁸ See note 30 *supra* & accompanying text.

⁷⁹ Compare *In re Chambers*, 69 N.D. 309, 285 N.W. 862 (1939), with *State ex rel. Snodgrass v. French*, 32 N.D. 362, 155 N.W. 687 (1915). Cf. note 53 *supra*.

⁸⁰ 69 N.D. 309, 285 N.W. 862 (1939).

⁸¹ See notes 47-50 *supra* & accompanying text.

⁸² The term "technical abatement" was used by the Supreme Court in *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964), to describe situations in which there was a clear legislative intent that a prosecution not be abated due to substantial re-enactment of a repealed statute or an amendment increasing punishment, but in which the penalties were nevertheless abated.

⁸³ Cf. note 30 *supra* & accompanying text.

⁸⁴ Recent court decisions reveal skepticism toward the notion that the scheme of general saving statutes evinces the legislative intent in all cases. See, e.g., *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965); *People v. Bilderback*, 9 Ill. 2d 175, 137 N.E.2d 389 (1956); *People v. Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S. 2d 367 (1956).

IV. THE JUDICIAL RESPONSE

In applying saving statutes in the context of ameliorative legislation, courts have had to resolve the question whether new penalties should be applied⁸⁵ in recognition that the law may well have been adjudged previously too severe, or whether the general saving statute should be read as an affirmation that past crimes were indeed wrong when committed and should be punished in accord with the prior law. An ancillary question, but one inextricably part of the equation, is which litigants, if any, should benefit by the delays which are part of the legal system,⁸⁶ be they in apprehension,⁸⁷ trial,⁸⁸ or appeal.⁸⁹ The answers differ not only with the jurisdictions, but also with the nature of the legislative change, as the following analysis shall demonstrate.

A. Reduction of Sentence

The relation of the saving statutes to a legislative change is most frequently brought into focus when the legislature changes the penalty for actions which it still deems criminal.

In *People v. Harmon*,⁹⁰ the defendant was convicted of the crime

⁸⁵ This question has been statutorily answered in very few states. See notes 66-70 *supra* & accompanying text.

⁸⁶ The speed with which a defendant may move through the criminal justice system may vary widely. For example, although the median time interval from filing to disposition of all criminal cases in the federal district courts in 1969 (the last year for which statistics have been fully compiled) was 2.5 months, the median interval for disposition by guilty plea was 1.7 months as opposed to 5.4 months median time for disposition by jury trial, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1969, at 22 (1971), giving the average defendant who opts for a jury trial more than two and one half months during which an ameliorative change might inure to his benefit. Yet the median time does not indicate the minimum and maximum intervals. As of June 30, 1969, for example, about 27% of all criminal cases were pending over 1 year in the United States district courts, with about 12.5% pending over 2 years. *Id.* 116-17. The time interval also may vary widely by district. In the Southern District of New York, 583 criminal cases had been pending for more than 2 years; in the Northern District of Oklahoma none had been pending more than 6 months. *Id.* An appeal in the federal system would add an additional opportunity for delay, the median time from lower court docketing to final appellate disposition being 20.8 months for all cases appealed, with a low median time of 13.6 months in the Tenth Circuit to a high of 27.3 months in the Third Circuit (1969 figures). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT 1969, at 194 (1970).

A similar broad disparity in the minimum and maximum times for disposition is evident in the state courts. For example, a study of a sample of 110 cases disposed of by the Trial Division of the Philadelphia Court of Common Pleas during November, 1971, reveals that 35% were adjudicated within 6 months after arrest, another 40% within 1 year, with 25% taking over 1 year, only 3% taking longer than 3 years, and none longer than 5 years. PHILADELPHIA JUSTICE CONSORTIUM, CRIMINAL JUSTICE SYSTEM, Ch. II, at 33-36 (1972). Similarly, a study of criminal cases pending in the Kansas district courts as of June 30, 1972, reveals that 84% had been pending less than 1 year, another 9% less than 2, and the remaining 7% more than 2 years. OFFICE OF THE JUDICIAL ADMINISTRATOR, STATISTICAL REPORT ON THE DISTRICT COURTS OF KANSAS, JULY 1, 1972, at 11 (1972).

⁸⁷ A relatively few states limit the scope of their saving statutes, however, to the post-apprehension stage. See notes 64-65 *supra* & accompanying text.

⁸⁸ Cf. notes 116-21 *infra* & accompanying text.

⁸⁹ Cf. notes 90-100 *infra*.

⁹⁰ 54 Cal. 2d 9, 351 P.2d 329, 4 Cal. Rptr. 161 (1960).

of assault with malice aforethought by force likely to produce great bodily injury, committed by one undergoing a life sentence in state prison, the mandatory penalty for which was death. While the defendant's appeal was pending, a statutory amendment passed which allowed for the imposition of a lesser penalty at the discretion of the judge or jury. In a four-to-three decision, the Supreme Court of California held that the defendant was not entitled to the benefit of the amendment. The court relied upon a long line of California appellate court decisions⁹¹ which interpreted the California general saving statute⁹² as applicable in this situation to preserve the harsher penalty, reasoning that the failure of the legislature to specifically provide for retroactive application, as it had done on previous occasions, made the saving clause operable. The statute clearly operates to allow prosecution and punishment for violations of since-amended statutes, but it does not specifically address the question of which statutory scheme or penalty is appropriate. The majority determined that the old penalty was required. The dissent disagreed as to the penalty, arguing that both the *Harmon* majority and the cases cited by it were based upon the erroneous premise that because the general saving clause applies to situations in which the punishment is increased,⁹³ it must also apply to situations in which the punishment is mitigated. The dissent reasoned that in situations in which the punishment is mitigated, the defendant could constitutionally be punished under either the old or the new statute, and the legislative intent that the defendant be punished, as manifested by the saving clause, was of no relevance in determining which statute applied. Mitigation of punishment by the legislature was a determination that the new punishment is the proper punishment for the crime and should be applied in all applicable cases. An opposite conclusion would of necessity "be predicated on the theory that punishment is intended as vengeance against the wrongdoer,"⁹⁴ attributing to the legislature questionable motives in light of modern theories of penology.⁹⁵ Both the intent of the legislature in amending the law and the purpose of the saving statute were brought into question.

⁹¹ *E.g.*, *People v. Fowler*, 175 Cal. App. 2d 808, 346 P.2d 792 (1959), *cert. denied*, 363 U.S. 849 (1960); *People v. Mason*, 163 Cal. App. 2d 630, 329 P.2d 614 (1958); *People v. King*, 136 Cal. App. 717, 29 P.2d 870 (1934).

⁹² CAL. GOV'T CODE § 9608 (West 1966). The statute provides:

The termination or suspension . . . of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed . . . unless the intention to bar . . . is expressly declared by an applicable provision of law.

⁹³ The clause is applied to avoid the combination of the doctrine of abatement and the *ex post facto* clauses resulting in a legislative pardon. *See, e.g.*, notes 35-40 *supra* & accompanying text.

⁹⁴ *People v. Harmon*, 54 Cal. 2d at 32, 351 P.2d at 343, 4 Cal. Rptr. at 175 (Peters, J., concurring in part & dissenting in part).

⁹⁵ *Id.* *See* *People v. Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956); S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* 691 (1963).

People v. Harmon was overruled five years later in *In re Estrada*.⁹⁶ The defendant pleaded guilty to the crime of escape without force or violence. At the time of the offense, the statute provided for a minimum imprisonment of one year and ineligibility for parole until at least two years were served after the conviction for escape. An amendatory act reducing the minimum penalty to six months and eliminating the restrictions on parole became effective prior to trial. The application of the unamended statute by the trial court was held to be in error. The court stated that this situation presented a "stronger case" for relief than the one in *Harmon* since the amendatory act became effective before trial, conviction, or sentence. The court recognized, however, that the basic legal issue was identical to the issue raised in *Harmon* and adopted the position of the dissent in that case. The court held that if an amendatory statute lessening punishment becomes effective prior to the date of appellate finalization, it is the amendatory statute which dictates punishment.⁹⁷ The court further expressed in dicta its feeling that rules of construction may be unwise if treated as inexorable *rules* and not merely as *guides*, saying:

[T]he rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent. In the instant case there are . . . other factors that indicate the Legislature must have intended that the amendatory statute should operate in all cases not reduced to final judgment at the time of its passage.⁹⁸

Yet *Estrada* represents what must clearly be considered the minority rule at this time, however wise the policy in it may be. Only one other state in which there is a broad saving statute of general applicability has judicially adhered to the *Estrada* formula—New York.⁹⁹ The principle of mitigatory changes inuring to the benefit of the defendant at any time prior to appellate finalization is, however, also followed judicially in North Carolina and Pennsylvania, two of the states without general saving clauses.¹⁰⁰

The continued vitality of the *Harmon* rule is illustrated by the recent decision of the Supreme Judicial Court of Maine in *State v. Alley*.¹⁰¹ Subsequent to appellant's trial but prior to the perfection of

⁹⁶ 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965).

⁹⁷ In this regard, the California court imposed the result required under the Missouri, Ohio, and Vermont statutes. See text accompanying note 69 *supra*.

⁹⁸ *In re Estrada*, 63 Cal. 2d at 746, 408 P.2d at 952, 48 Cal. Rptr. at 176.

⁹⁹ See, e.g., *People v. Roper*, 259 N.Y. 170, 181 N.E. 88 (1932).

¹⁰⁰ See *State v. Pardon*, 272 N.C. 72, 157 S.E.2d 698 (1967); *State v. Link*, 13 N.C. App. 568, 186 S.E.2d 634 (1972); *Commonwealth ex rel. Milk v. Maroney*, 198 Pa. Super. 442, 181 A.2d 702 (1962); *Commonwealth v. Beattie*, 93 Pa. Super. 404 (1928).

¹⁰¹ 263 A.2d 66 (Me. 1970). *Accord*, *State v. Gellers*, 282 A.2d 180 (Me. 1971).

his appeal, the penalty for possession of marijuana was reduced from a minimum term of two years to a maximum term of eleven months. Appellant, who had been sentenced to an indefinite period of confinement, argued that he should receive the benefit of the new statute. This argument was summarily dismissed by citation to the Maine statute¹⁰² and to "[t]he weight of authority."¹⁰³ The rule that saving statutes save both the liability and the penalty and invariably require the punishment in effect at the time of the offense is also followed in Arizona, Florida, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Nevada, and Oklahoma,¹⁰⁴ as well as in the federal system.¹⁰⁵

The position the federal courts have taken toward statutory changes mitigating punishment is worthy of special note. Unlike the questionable language of the California statute,¹⁰⁶ the federal saving statute clearly applies to both prosecution and penalty,¹⁰⁷ and the courts, in cases in which their only basis for decision was the general saving statute, have consistently refused to apply mitigatory changes.¹⁰⁸ It is

¹⁰² ME. REV. STAT. ANN. tit. 1, § 302 (1964).

¹⁰³ *State v. Alley*, 263 A.2d at 69. It is interesting to note that included in that authority was a citation to the previously overruled decision in *Harmon*. See *id.*

¹⁰⁴ See *State v. Vineyard*, 96 Ariz. 76, 392 P.2d 30 (1964); *Ex parte Browne*, 93 Fla. 332, 111 So. 518 (1927); *State v. Hardman*, 16 Ind. App. 357, 45 N.E. 345 (1896); *State v. Shaffer*, 21 Iowa 486 (1866); *In re Schneck*, 78 Kan. 207, 96 P. 43 (1908); *State v. Dreaux*, 205 La. 387, 17 So. 2d 559 (1944); *Patrick v. Commissioner*, 352 Mass. 666, 227 N.E.2d 348 (1967); *Tellis v. State*, 84 Nev. 587, 445 P.2d 938 (1968); *Lilly v. State*, 7 Okla. Crim. 284, 123 P. 575 (1912).

¹⁰⁵ See notes 106-14 *infra* & accompanying text.

¹⁰⁶ See note 92 *supra*.

¹⁰⁷ The statute provides that no "penalty, forfeiture, or liability incurred under a repealed statute [shall be affected by the repeal] unless the repealing Act shall so expressly provide . . ." 1 U.S.C. § 109 (1971).

¹⁰⁸ See, e.g., *Hurwitz v. United States*, 53 F.2d 552 (D.C. Cir. 1931); *Maceo v. United States*, 46 F.2d 788 (5th Cir. 1931).

In *United States v. Stephens*, 449 F.2d 103 (9th Cir. 1971), however, the government petitioned for a writ of mandamus to compel a sentencing judge to vacate his order suspending the sentences of three defendants convicted of narcotics offenses involving marijuana. Although the statute under which the defendants were convicted did not authorize suspended sentences, an amendment to that statute, effective after the date of conviction but prior to sentencing, did so provide. Compare 21 U.S.C. § 844(b) (1970), with Act of July 18, 1956, ch. 629, § 7237(d), 70 Stat. 569. The court held that the defendant was properly sentenced to five years under the old law but the sentence could be suspended and probation granted by virtue of the repeal of the act prohibiting suspended sentences and probation. The court, relying on *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964), reasoned that neither the specific saving clause included in the amendment nor the general saving statute affected execution of sentence so as to preclude suspension of sentence, finding the general saving statute applicable primarily to prevent "technical abatements" which would preclude prosecution. The policy basis of the court's decision is reflected in its statement that "[a]llowing [probation] here permits a salutary tempering of the arbitrariness which otherwise would result from hewing to a cut-off date in transition from old to new law and an approach to even handed dispensation of justice not otherwise available. We fail to see how the public interest would be served by straining for a statutory construction that would achieve a contrary result." 449 F.2d at 106. This case is, however, readily distinguishable from the prior federal cases since it applies to the manner of execution rather than the term of sentence. The court specifically stated:

[W]e do not regard the grant of probation as a release or extinguishment of penalty. It does not wipe clean the defendant's penal obligation. Rather it provides means alternative to imprisonment for satisfying it.

the relation of the general statutory saving provision to specific saving clauses written into the amendatory language which has taken a unique twist.

In *Lovely v. United States*¹⁰⁹ the defendant was convicted of rape on a federal reservation. His first conviction was reversed and, prior to retrial, the statute was repealed and an amendatory act provided for a possible sentence of a term of years, in lieu of a sentence of death or life imprisonment as provided in the repealed statute.¹¹⁰ The amending act, which was the act revising, codifying, and enacting into positive law title 18 of the *United States Code*,¹¹¹ provided in the repeal provisions that "[a]ny rights or liabilities now existing . . . shall not be affected by this repeal."¹¹² Interpreting "liabilities" to be synonymous with the word "penalty" in the general saving statute,¹¹³ the court held that the defendant was subject to sentence under the old statute and affirmed the life sentence. The difference between "penalty, forfeiture, or liability" and "rights or liabilities" was, for the court, "a technical distinction without a real difference,"¹¹⁴ and the effect of the two saving provisions merely cumulative.

This reading either ignores completely Congress' intent or strains it to its outermost limits. For one must ask why Congress included a specific saving provision in the act, with language different from that of the general saving statute, if it intended that there be no difference. Inclusion of a specific saving clause more logically indicates that Congress either overlooked the general saving statute or intended that the general saving statute not apply, but rather that a less stringent policy be applicable.¹¹⁵ The most sensible reading, and the one which the courts would probably have arrived at had they tried to discern congressional intent rather than mechanically apply a blanket rule, is that Congress determined that the penalty was too severe and therefore

But see *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972), in which the Court of Appeals for the First Circuit rejected the *Stephens* decision and held that defendants convicted prior to the effective date of the amendment were "ineligible for suspended sentences, parole, or probation" because "under the mandate of § 109 the repealed statute . . . is '[to] be treated as still remaining in force.'" 455 F.2d at 1191. *See also* *United States v. Fiotto*, 454 F.2d 252 (2d Cir. 1972); *United States v. Fithian*, 452 F.2d 505 (9th Cir. 1971); *United States v. Robinson*, 336 F. Supp. 1386 (W.D. Wis. 1971). It therefore appears that the basic federal position will remain unchanged.

¹⁰⁹ 175 F.2d 312 (4th Cir.), *cert. denied*, 338 U.S. 834 (1949).

¹¹⁰ Compare 18 U.S.C. § 2031 (1971), with Act of Mar. 4, 1909, ch. 321, §§ 278, 330, 35 Stat. 1143, 1152.

¹¹¹ Act of June 25, 1948, ch. 645, 62 Stat. 683.

¹¹² *Id.* § 21, 62 Stat. 862.

¹¹³ Compare *id.* with 1 U.S.C. § 109 (1971).

¹¹⁴ *Lovely v. United States*, 175 F.2d at 316. *Accord, e.g., Duffel v. United States*, 221 F.2d 523 (D.C. Cir. 1954).

In terms of precedent, at least, the decision is justifiable. The court relied, in large part, upon an old Supreme Court case, which, while interpreting the scope of the general saving statute equated "liability" with "punishment." *See United States v. Reisinger*, 128 U.S. 398, 403 (1888).

¹¹⁵ Where there is a conflict between the terms of the specific and general saving provisions, the specific is applied. *See, e.g., State v. Showers*, 34 Kan. 269, 8 P. 474 (1885).

changed it. An intention to apply the repealed penalty to cases coming to trial after repeal could have been manifested by including the word "penalty" in the specific saving clause. A fair reading of the specific saving clause indicates that Congress intended only that prior crimes not go unpunished due to repeal and the doctrine of abatement, but it is extremely questionable that Congress made a determination that the higher penalty should apply to cases not yet tried. The only interpretation of congressional intent that could justify the decision in *Lovely* is that Congress knew that the courts had held "liability" and "penalty" synonymous, and therefore relied on the judicial interpretation instead of specifically so stating. The weakness of such an interpretation is self-evident.

An intermediate position between the *Estrada* and the *Alley* or *Lovely* approaches is taken by the nine states with mitigatory provisions in their general saving statutes,¹¹⁶ and a number of other states that refuse to apply the saving provisions to all ameliorative changes in punishment.¹¹⁷ In these states, the crucial date is the date of sentencing in the trial court. In contrast to the jurisdictions following either the "no benefit" or the "benefit at any time prior to appellate finalization" rules, the intermediate position grants the defendant the benefit of any legislative changes made up to the date of his sentencing by the trial court. In *State v. Lewis*,¹¹⁸ the defendant had been sentenced to death. While his appeal was pending, the death penalty was legislatively abolished, but the court held that due to the Missouri general saving statute, the ameliorative legislation did not benefit the defendant. But in *State v. Tapp*,¹¹⁹ the penalty for possession of marijuana was reduced prior to defendant's trial and sentencing, and the court held that despite the Utah saving statute, the new, lesser penalties would apply. The defendant thus received the benefit of one and one-half years pre-trial delay; had his trial been "speedy" he would have suffered harsher penalties.

The policy for the "intermediate" position is apparently no clearer than that for the "no benefit" rule. Rather than trying to ascertain the true intent and purpose of the legislature in its abolition of the death penalty, the court in *Lewis* merely rested its decision on narrow interpretations of both the statutes¹²⁰ and its jurisdictional ambit, holding

¹¹⁶ See notes 66-69 *supra* & accompanying text.

¹¹⁷ See, e.g., *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971); *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959); *State v. Pace*, 80 N.M. 364, 456 P.2d 197 (1969); *State v. Zornes*, 78 Wash. 2d 9, 475 P.2d 109 (1970).

¹¹⁸ 273 Mo. 518, 201 S.W. 80 (1918).

¹¹⁹ 26 Utah 2d 392, 490 P.2d 334 (1971).

¹²⁰ The saving provision in effect at the time, basically unchanged in its current version, Mo. ANN. STAT. § 1.160 (1969), provided:

[I]f the penalty or punishment for any offense be reduced . . . such penalty or punishment shall be assessed according to the amendatory law.

The court held that the punishment had *already been assessed* and sentence pronounced

that its powers of review were limited to the correction only of errors of the trial court as to the time or place of imprisonment.¹²¹

Another court taking this intermediate position was recently troubled by its implications. In *Belt v. Turner*¹²² the defendant pleaded guilty to the charge of issuing a fraudulent check and was placed on probation *without the imposition of sentence*, with the proviso that he serve six months in the county jail. After release from the jail the defendant violated probation and was sentenced to a term not to exceed five years in the state prison, the maximum sentence for violation of the original charge at the time of the offense and guilty plea. On appeal, the court, in a three-to-two decision, held that the amendatory act which became effective prior to actual sentencing for the original crime was the proper act to be applied, and it authorized a maximum sentence of only six months in the county jail. The court remanded the case to the trial court for resentencing with a reminder that the defendant had already served six months in the county jail. In the dissenting opinion on rehearing¹²³ it was emphasized that the defendant in another case, *State v. Miller*,¹²⁴ committed the same offense at approximately the same time and was sentenced to an indeterminate term in the state prison. That defendant raised on appeal the argument that the mitigatory act which became effective while his case was on appeal should be applicable, but there the court held that the general saving statute applied and the higher penalty was proper. The irony of the situation, and a circumstance which shows how arbitrarily the "sentencing" date can be applied, was that the defendant in *Belt v. Turner* failed to appear for sentencing as originally scheduled at a date prior to the effective date of the amendment, conveniently absenting himself from the state and conveniently reappearing for sentencing only after the lesser penalty was in effect. Had Belt appeared on the scheduled sentencing date, under the holding in *Miller*, he would have gotten the higher penalty. The dissent argued that the defendant in *Belt* was rewarded for failing to appear for sentencing while the defendant in *Miller* appeared on the proper day for sentencing and received the higher penalty.

As the above cases illustrate, the use of the general saving clause to determine the applicability of a mitigatory change in punishment often produces unsatisfactory and inconsistent results. The contradiction between a legislative determination that a punishment is too harsh

under the prior law and before the amendment was effective. *State v. Lewis*, 273 Mo. at 536, 201 S.W. at 85.

¹²¹ *Id.* The court concluded that

[T]he sentence and judgment . . . were correct and in no way erroneous at the time of their entry, and the new law . . . does not affect them in any way.

Id. at 536-37, 201 S.W. at 85-86.

¹²² 25 Utah 2d 230, 479 P.2d 791, *aff'd on rehearing*, 25 Utah 2d 380, 483 P.2d 425 (1971).

¹²³ 25 Utah 2d 380, 382, 483 P.2d 425, 426 (1971) (Henriod, J., dissenting).

¹²⁴ 24 Utah 2d 1, 464 P.2d 844 (1970).

and a simultaneous routine application of the harsh sentence by the courts is troublesome particularly when the applicability is determined by a general statute which the legislature probably did not take into consideration in framing its mitigatory act.¹²⁵ Applying the mitigatory act only to cases in which there has not been a judgment in the trial court provides certainty but is arbitrary and will produce inequities such as those described in *Belt v. Turner*.¹²⁶ Under this scheme, the punishment authorized for two people who commit the same crime on the same day will depend upon who comes to trial first. The *Estrada* scheme presents a parallel problem. A defendant who pleads guilty or does not appeal will be subject to the harsher penalty while a defendant who does appeal will get the benefit of the mitigatory provisions enacted while his appeal was pending. The federal scheme is even-handed since everyone committing the same crime on the same day will be subject to identical penalties, but this subjects defendants to punishment which the legislature has since deemed inappropriate.

One solution to the dilemma is to require the legislature to indicate expressly its intention in its amending or repealing act. The clause should not be couched in general terms such as "rights or liabilities" but should clearly state that the mitigated punishment will or will not apply to crimes committed before the effective date of the amendatory act or whatever line the legislature wishes to draw. Another feasible approach would be the thorough re-examination of the various existing saving statutes by the individual legislatures, with these difficulties in mind, and the fashioning of new general language designed most nearly to effectuate what is deemed by it the proper result.¹²⁷ In the absence of an express statement, the mitigated penalty should be applied by the courts at least in all cases in which the conviction has not been finalized, as was done in *Estrada*. In essence, the policy manifested by the court in *Estrada* parallels the policy supporting the doctrine of abatement. Inherent in both unqualified repeals and mitigatory changes in punishment is a legislative determination that the present law is inappropriate. If for some reason the legislature deems it necessary that the harsher penalty prevail, it can fashion its acts so that this determination is evident to the courts.

As shown earlier,¹²⁸ the general saving statutes were promulgated to prevent wrongdoers from completely escaping punishment. They were not designed to negate the intention of the legislature when it mitigates the punishment for an act, and it is evident that the current

¹²⁵ See *People v. Bilderback*, 9 Ill. 2d 175, 137 N.E.2d 389 (1956).

¹²⁶ See notes 122-24 *supra* & accompanying text.

¹²⁷ Such a provision might include phrasing such as:

All liabilities and penalties are preserved, provided that if the effect of the new or amended statute is to lessen or mitigate the previous penalty, the new penalty shall be applied in all cases in which judgment is not then finalized.

¹²⁸ See text accompanying note 50 *supra*.

use of the general saving statutes by the courts abuses that intent. Few courts have given this problem the analysis it deserves. The prevailing practice, as the opinions in the cases reveal, is basically the mechanical application of the general saving statutes to reach decisions which are arbitrary and unreasonable insofar as they completely ignore the policies which produced the doctrine of abatement and its progeny, the general saving statutes.

B. *Reclassification of Conduct*

Confusion and inconsistency in the courts as they endeavor to construe saving language is not limited to the circumstance of mitigation of penalty. Legislative reclassification of a crime into different degrees or classes, each one of which carries its own penalty, seems analogous to the mitigation of penalties. Both will generally involve a decision by the legislature that particular acts, though wrongful, may have been punished too severely, and that therefore an adjustment in penalty—and here also an adjustment in some of the substantive elements of the original crime—is required. In essence, a reclassification is a two-step reduction of penalty; crimes are differentiated into degrees, most of which carry reduced penalties. In this less frequently litigated area, the courts show confusion in their various guesses at legislative purpose, and also inconsistency with their other decisions.

In the states which have mitigatory provisions in their saving clauses, it has been held that the defendant is not entitled to choose to be tried under the current statute since change in the law of this type is not technically a mitigation of penalty.¹²⁹ In states which adhere to the "no benefit" rule, the reclassification of a crime into degrees will not inure to the benefit of the defendant, even if the reclassification occurs prior to trial, due to the application of the general saving statute.¹³⁰ But New Jersey, a state in which the court takes the intermediate position on mitigation of sentence by refusing to apply the saving clause,¹³¹ also does not give the defendant the benefit of a reclassification. In *State v. Baechlor*,¹³² the defendant was denied the benefit of a reclassification of the crime of breaking and entering, even though the new law was in effect before trial. The court instead mechanically applied the general saving statute and held that the defendant was properly tried under the old law. As might be expected, the California courts, following the reasoning of *Estrada*, give the defendant the benefit of any reclassification which occurs prior to appellate finalization of conviction.¹³³

¹²⁹ See, e.g., *Huckabee v. State*, 123 Ala. 20, 26 So. 523 (1898); *People v. Bilderback*, 9 Ill. 2d 175, 137 N.E.2d 389 (1956).

¹³⁰ See, e.g., *State v. Vineyard*, 96 Ariz. 76, 392 P.2d 30 (1964); *Plummer v. State*, 83 Fla. 689, 92 So. 222 (1922); *State v. Shaffer*, 21 Iowa 846 (1866); *Bilbrey v. State*, 76 Okla. Crim. 249, 135 P.2d 999 (1943).

¹³¹ See *In re Smigelski*, 30 N.J. 513, 154 A.2d 1 (1959).

¹³² 52 N.J. Super. 378, 145 A.2d 631 (App. Div. 1958).

¹³³ See *People v. Cloud*, 1 Cal. App. 3d 591, 81 Cal. Rptr. 716 (1969).

If there is a rational policy for distinguishing the treatment of reclassification and mitigatory changes, it is not obvious, nor is it expressed in the case law. The only difference between the two types of actions is that reclassification may require new trials while mitigation only requires resentencing. If this is a difference worthy of distinction, it would be far better for the legislature to decide whether it can safely risk the loss of previously won convictions to new trials, by allowing retroactive application, than to have the courts recite a mechanical application of the general saving statute.

C. *Criminal Responsibility*

Another class of legislative change is the redefining of criminal responsibility, most typically the removal of adult responsibility and punishment provisions from minors, making their offenses punishable only under juvenile delinquency proceedings. Although there are very few cases which fall into this classification, and their interest is largely historical, they reveal an equal inconsistency and harshness.

The leading case in this area is *People v. Oliver*.¹³⁴ The defendant, a fourteen year-old at the time of the act, was indicted for murder. Found incompetent to stand trial, he spent nine years in a mental institution during which time the law was altered to provide that a child under the age of fifteen could not be prosecuted criminally for any act but was subject only to delinquency proceedings. The court held that the New York general saving statute was not applicable in this case and ordered the conviction reversed and the defendant discharged. In a rare, comprehensive policy discussion, the court traced the history of the general saving statute and concluded that in the absence of a clear legislative instruction to the contrary, the general nature of the act required that it be applied to all offenders not tried and sentenced when it became law. The court observed:

The Legislature has, in effect, simply concluded that a more humane treatment suffices to subserve the law's proper ends in treating juvenile offenders. To preserve the criminal penalties previously in force and to inflict them after the law-making body has so determined and declared would serve no justifiable purpose.¹³⁵

An almost identical situation faced the Massachusetts Supreme Court in *Nassar v. Commonwealth*,¹³⁶ but with different results. After the sixteen-year-old defendant had been indicted for murder, a statute was enacted which provided for delinquency rather than criminal proceedings against a child between the ages of fourteen and seventeen

¹³⁴ 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956).

¹³⁵ *Id.* at 161, 134 N.E.2d at 202, 151 N.Y.S.2d at 374.

¹³⁶ 341 Mass. 584, 171 N.E.2d 157 (1961).

in all cases not punishable by death. The defendant then pleaded guilty to second degree murder. The court held that the Massachusetts general saving statute saved the conviction. The court reasoned that while the change in the statute would have resulted in the charge's being treated as a delinquency charge, interpreting the statute as having no retroactive effect seemed to it neither absurd nor unreasonable. Admitting that in view of the broad humanitarian purposes of the act, it was arguable that the legislature would have wanted the act to apply in all pending cases, the court concluded that the wording of the statute¹³⁷ and the general saving statute were entitled to priority over the general purpose of the act and denied relief.

This issue has not been passed upon in other jurisdictions, but—to the extent that these cases are predictable—it is reasonable to predict that each state court would adhere, in dealing with changes in the parameters of criminal responsibility, to the same approach which it would apply in penalty reduction cases. Exceptions to this pattern would be found in those states which deal with mitigatory changes in their general saving statutes.¹³⁸ Because a change in the definition of criminal responsibility is not construed as a "mitigation," in those states, it is likely that the courts would apply the general saving statutes as they have done in the reclassification cases,¹³⁹ applying the law as it existed at the time of the offense.

A rational interpretation of legislative intent in this area, as in the case of reduction of sentence, points toward the application of the new law to at least all cases in which convictions have not been finalized. Equally inherent in a legislative change of this nature as it is in sentence reduction, is a determination of undue harshness which dictates that the benefits of the law should not be denied except in cases of clear and unquestioned legislative intent.

D. *Substantive Offenses*

The last major category of legislative change to which the saving statutes apply is the repeal of a criminal statute, and the subsequent decriminalization of previously criminal conduct. The repeals are of two types.

The first of these is the type of legislative change to which the original saving statutes were directed, the saving from "technical abatement"¹⁴⁰ of prosecutions following either an increase in penalty¹⁴¹

¹³⁷ The statute provided that criminal proceedings should not be begun unless delinquency proceedings had been begun and dismissed. *See id.* at 588, 171 N.E.2d at 160.

¹³⁸ *See* notes 66-69 *supra* & accompanying text.

¹³⁹ *See* note 129 *supra* & accompanying text.

¹⁴⁰ *See* note 82 *supra*.

¹⁴¹ *See, e.g.,* *People v. Wyckoff*, 106 Ill. App. 2d 360, 245 N.E.2d 316 (1969); *State v. Cline*, 135 Mont. 372, 339 P.2d 657 (1959).

or the repeal and substantial re-enactment of a criminal provision.¹⁴² In these cases, the statutes have clearly and consistently been used to prevent unintentional and unwarranted legislative pardons.

A distinction, however, should be made between situations of unqualified or absolute repeal—the determination that a certain type of conduct is no longer criminal—and those of substantial re-enactment following repeal.

This distinction generally has not been made by the courts, nor has the simple, central question in this area—whether past crimes are still to be considered criminal—adequately been addressed. Thus, for example, in *State v. Tracy*,¹⁴³ the defendant was prosecuted for violation of a negligent homicide statute which subsequently was repealed without re-enactment.¹⁴⁴ The court applied the general saving clause and held that the prosecution was not abated. Other courts have all but universally applied the general saving statutes in the same fashion in other clear cases of absolute repeal, without considering the question of re-enactment relevant in deciding whether to apply them.¹⁴⁵

Evidently only one state court, the Illinois intermediate appellate court, has refused to apply the general saving statute in a situation of absolute repeal. In reversing a conviction for violation of the Illinois Prohibition Act, which was repealed while the case was pending on appeal, the court in *People v. Speroni*¹⁴⁶ construed the particular wording of the statute as not including cases of absolute repeal, stating:

From the reading of this section we believe it is intended to apply only to new acts of legislation amending existing acts, or to subsequent legislation which by repugnant provisions therein repeals or changes certain portions of an existing act. We do not understand that this section contemplates a com-

¹⁴² See, e.g., *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954); *People v. McDonald*, 13 Mich. App. 226, 163 N.W.2d 796 (1968).

New codifications frequently are passed with specific saving clauses relating only to crimes and penalties under previous codes. See note 52 *supra*; text accompanying notes 111-12 *supra*.

¹⁴³ 64 N.M. 55, 323 P.2d 1096 (1958).

¹⁴⁴ The statute, N.M. STAT. ANN. § 64-22-1 was repealed in 1957 (Laws 1957, ch. 239, § 1) but substantially re-enacted in 1969 (Laws 1969, ch. 138, § 1).

¹⁴⁵ See, e.g., *People v. DeStefano*, 64 Ill. App. 2d 389, 212 N.E.2d 357 (1965), *cert. denied*, 385 U.S. 821 (1966); *Ware v. State*, 13 Md. App. 302, 283 A.2d 177 (1971) (claim dismissed in footnote); *Brown v. State*, 170 Miss. 86, 153 So. 302 (1934); *State v. Proctor*, 90 Mo. 334, 2 S.W. 472 (1886); *State v. Crusius*, 57 N.J.L. 279, 31 A. 235 (S. Ct. 1894); *Gass v. State*, 130 Tenn. 581, 172 S.W. 305 (1914).

But see *Bell v. Maryland*, 378 U.S. 226 (1964), in which the Supreme Court, following state abatement law, suggested that in certain cases of absolute repeal, Maryland might construe its saving statute narrowly, and hold the prior law ineffective. In reaching that decision, Justice Brennan was said to have "pushed the legal materials to their limit." Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CR. REV. 137, 144. Justice Brennan evidently had pushed them too far, for on remand the Court of Appeals of Maryland disagreed with him and affirmed the convictions under the repealed law. *Bell v. State*, 236 Md. 356, 204 A.2d 54 (1964).

¹⁴⁶ 273 Ill. App. 572 (1934).

plete extinction of an old act, without any new or subsequent legislation created to take its place.¹⁴⁷

But *Speroni* is unique; despite the apparent wisdom of the holding, it has neither been followed in other criminal cases, nor has its reading been approved by the Illinois Supreme Court, which in *People v. Bilderback*¹⁴⁸ specifically rejected the *Speroni* interpretation of the statute.

Until recently, it was clear that the federal courts also rigidly adhered to the same type of "no benefit" rule which characterizes this area.¹⁴⁹ But in *Hamm v. City of Rock Hill*,¹⁵⁰ the Supreme Court indicated that, at least under certain circumstances, the federal saving statute would not apply in the event of a repeal. A difficult decision in many aspects, *Rock Hill* held, *inter alia*, that the Civil Rights Act, because "[i]t substitutes a right for a crime,"¹⁵¹ requires the abatement of convictions for actions which, though criminal at the time of their commission, were now protected by federal regulation, if not affirmatively encouraged by it. The Court construed the purpose of the federal saving statute as one "meant to obviate mere technical abatement,"¹⁵² finding the Civil Rights Act "[s]o drastic a change [as to be] well beyond the narrow language of amendment and repeal"¹⁵³ contained in the saving statute.

Neither the basis for the Court's decision¹⁵⁴ nor its implications on federal abatement law are clear. It has been noted that the "substitutes a right for a crime" language in the opinion "seems to suggest that a distinction is to be made between merely rendering permissible acts that were formerly criminal and ordering or affirmatively encouraging those acts."¹⁵⁵ Were this a proper distinction—although it may be said that whenever an act is made no longer criminal that a "right" is substituted in its place—then *Rock Hill*, which purports to

¹⁴⁷ *Id.* at 578.

¹⁴⁸ 9 Ill. 2d 175, 137 N.E.2d 389 (1956).

¹⁴⁹ See, e.g., *Ladner v. United States*, 168 F.2d 771 (5th Cir. 1948); *United States v. Segelman*, 117 F. Supp. 507 (W.D. Pa. 1953); cf. *United States v. United States Coin & Currency*, 401 U.S. 715, 735-39 (1971) (White, J., dissenting).

¹⁵⁰ 379 U.S. 306 (1964).

¹⁵¹ *Id.* at 314.

¹⁵² *Id.*

¹⁵³ *Id.* Having determined that the prosecutions, if federal, would be abated, the Court held that the supremacy clause required that state prosecutions also be abated. *Id.* at 315.

¹⁵⁴ The majority decision was met with vehement dissent on this point by 3 of the 4 dissenters and by the commentators. See *id.* at 318 (Black, J., dissenting) ("The idea . . . has no precedent . . ."); *id.* at 322 (Harlan, J., dissenting) ("no support in reason or authority"); *id.* at 328 (White, J., dissenting) ("seems . . . to point to the conclusion exactly opposite . . ."); MacKenzie, *supra* note 54. But cf. Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, 1965 SUP. CT. REV. 159, 166 (The Court "wisely" avoided the 14th amendment issue).

¹⁵⁵ *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 134 (1965).

rest upon prior federal law, would be consistent with its precedents.¹⁵⁶ If, however, one is to believe Justice Clark's assertion that the saving statute saves only technical abatements, then virtually all federal law in this area would be reversed and, perhaps not unwisely, there would be

put back on Congress the burden of spelling out expressly, statute by statute, in laws passed hereafter that it does not want to upset convictions for past crimes, a burden which Congress renounced nearly 100 years ago and which it did not know it had when it passed the 1964 Act.¹⁵⁷

The only other interpretation which would do justice to both the bulk of prior federal law and to Justice Clark's broad assertions is that the federal courts are to adopt the *Speroni* position which the Illinois court had rejected,¹⁵⁸ that in cases of absolute and unqualified repeal all prosecutions abate. This position has not been taken, though, by the lower federal courts.¹⁵⁹

If such a position were taken, however, it would be readily justifiable. For the policy considerations in the area of repeal of substantive offenses are directly related to the common law doctrine of abatement, a doctrine geared to extinguishment of punishment after an unqualified repeal of a statute. Punishment can be presumed to serve no legislative purpose at the point of repeal, unless, of course, the legislature specifically finds it necessary to punish, at least in some fashion, past

¹⁵⁶ See text accompanying notes 109-14 *supra*.

¹⁵⁷ *Hamm v. City of Rock Hill*, 379 U.S. at 320 (Black, J., dissenting).

¹⁵⁸ See notes 146-48 *supra* & accompanying text.

¹⁵⁹ At least there is no evidence that it has been taken. See, e.g., *United States v. Resnick*, 455 F.2d 1127 (5th Cir. 1972), in which the defendants were found guilty of melting silver currency in violation of the Coinage Act of 1965, § 105, 31 U.S.C. § 395 (1970) (permitting the Secretary of the Treasury to authorize regulations "necessary to protect the coinage of the United States") and the regulations promulgated thereunder, 32 Fed. Reg. 7496 (1967). Prior to trial, these regulations were revoked, see 34 Fed. Reg. 7704 (1969), but the prosecutions were not abated because "the authorizing legislation [was not] repealed," and "the Act and not the regulation . . . establishes the crime and fixes the penalty." 455 F.2d at 1134. The revocation of a rule or regulation would not, therefore, bar prosecution.

Prosecutorial discretion may explain why the issue of retroactive repeal after *Rock Hill* has not been formally decided. In *United States v. First Nat'l Bank*, 329 F. Supp. 1251 (S.D. Ohio 1971), for example, the court dismissed charges brought under the then current criminal provisions of the Federal Corrupt Practices Act of 1925, 43 Stat. 1070; see 18 U.S.C. § 610 (1970). The government appealed the dismissal, but during the pendency of the appeal, the Corrupt Practices Act was repealed by § 405 of the Campaign Communications Reform Act, Pub. L. No. 92-225 (Feb. 7, 1972), 86 Stat. 3, 20, which removed criminal sanctions for the violations at issue. Contending that the amendment was prospective only in its application (even though a "right" was substituted for a "penalty"), the Justice Department nevertheless indicated that it would drop charges because "the interest of justice would not be served by continuing to seek convictions for transactions that were allowed under the new law," Wall St. J., Feb. 18, 1972, at 28, col. 5, thus avoiding the question of retroactivity. It is quite possible that sensitivity in enforcement agencies may avoid future court challenge. But see *United States v. Seafarers Int'l Union*, 343 F. Supp. 779 (E.D.N.Y. 1972), a prosecution under the Corrupt Practices Act, in which its prior repeal was not even argued, but in which the indictment was dismissed on other grounds.

violators of the repealed criminal code, and clearly intends that only *future* acts be deemed non-criminal. Inherent in an act mitigating punishment, reclassifying an offense, or narrowing criminal responsibility is a legislative determination that the prior conduct indeed was offensive. If a repeal is unqualified, then it is apparent that the legislature no longer views the formerly proscribed conduct as offensive; any punishment would appear contrary to legislative purpose.

A repeal, however, which is followed by substantial re-enactment does not share the characteristic of a legislative determination that the prior conduct was inappropriate for punishment. Thus, a general statute only saving prosecutions for offenses committed under a law which has been amended or repealed and re-enacted with a greater penalty would suffice to prevent legislative pardons where they obviously were not intended. Legislative adoption of this narrow type of saving statute would obviate the injustices produced by the current general saving statutes and force the legislatures and the courts to reasoned consideration of the policies surrounding an ameliorative change in a criminal statute.

V. THE PROBLEM OF FINALIZED CONVICTIONS

No matter what the nature of the change, ameliorative legislation has never been held to apply to finalized convictions.¹⁶⁰ It is well-settled that a legislative change will not arrest or interfere with execution of sentence.¹⁶¹ The reasons typically given by the courts are that there never could be certainty in the criminal process if legislative changes were applied to finalized judgments, and, in any event, the parole, pardoning, and clemency powers are held to be vested in the executive and not in the legislature.¹⁶²

In regard to the first rationale, the broad scope of available collateral remedies¹⁶³ raises the question of whether, as a practical matter, a conviction is ever "certain" prior to completion of sentence

¹⁶⁰ See ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES § 2.1, at 39 (1967).

For standard definitions of "final conviction," see, e.g., *Campbell v. Superior Court*, 105 Ariz. 252, 255, 462 P.2d 801, 804 (1969) ("[A] 'final conviction' . . . is a judgment of conviction from which [a defendant] has exhausted his right to appeal."); *State v. Lynn*, 5 Ohio St. 2d 106, 108, 214 N.E.2d 226, 229 (1966) ("The term, 'final conviction,' . . . means a conviction in which the accused has exhausted all his appellate remedies or as to which the time for appeal as of right has expired."). Determinations of substantive relief may therefore turn on the applicability of the definition. See, e.g., *People v. McCloskey*, 2 Ill. App. 3d 892, 274 N.E.2d 358 (1971); *People v. Keating*, 2 Ill. App. 3d 884, 274 N.E.2d 362 (1971).

¹⁶¹ See, e.g., *Welch v. Hudspeth*, 132 F.2d 434 (10th Cir. 1942); *Odekirk v. Ryan*, 85 F.2d 313 (6th Cir. 1936); *United States ex rel. Cheramie v. Dutton*, 74 F.2d 740 (5th Cir.), cert. denied, 295 U.S. 733 (1935); *United States ex rel. Voorhees v. Hill*, 72 F.2d 826 (3d Cir. 1934).

¹⁶² See, e.g., *In re Kline*, 70 Ohio St. 25, 27, 70 N.E. 511, 512 (1904).

¹⁶³ See, e.g., ABA STANDARDS RELATING TO POST-CONVICTION REMEDIES §§ 2.1-4 (1967); *Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

or complete exhaustion of collateral remedies. Additionally, there is so much uncertainty due to the possibility of retroactive application of constitutional decisions¹⁶⁴ and the availability of relief on that basis, that adding the possibility of retroactive application of legislative changes does not significantly increase the amount of uncertainty.

The second rationale is more formidable. An analysis of ameliorative legislation cases reveals judicial adherence to the "direct appeal" line of finalization, based upon the theory that the legislature constitutionally lacks the power to grant pardons or clemency and that any legislative reduction or extinguishment of penalty would be in the nature of a pardon or clemency.¹⁶⁵ One method of circumventing this limitation has been attempted in the State of Washington, where a recent enactment following an ameliorative change in the marijuana laws¹⁶⁶ directed the board of prison terms and parole

to review the mandatory portion of the minimum sentence of each offender presently incarcerated who was convicted of a crime relating to marijuana under [the old law] and in its discretion . . . the board may . . . set aside the mandatory minimum term and make a new order fixing the minimum term of confinement which shall not be less than any minimum term of confinement applicable had the offender been sentenced under [the new law]¹⁶⁷

Through enactments such as this, the legislature is able to indicate its intention that convicts benefit from an ameliorative change without intruding into the area of executive authority. Additionally, several state constitutions allow legislative participation in the pardoning and clemency processes¹⁶⁸ and therefore, in these states, there would be no limitation on retroactive application of ameliorative legislation.

Some courts as well as some legislatures have recognized that drawing the line at finalized convictions is no less arbitrary or more fundamentally fair than drawing the line at any other stage in the criminal process. The dissenting justices in *Estrada* recognized the unfairness of using finalization of conviction as the benefit/no-benefit line in arguing against retroactive application of ameliorative legislation at any stage of the criminal process.¹⁶⁹ Similarly, the dissent in

¹⁶⁴ Compare, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961), with, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965).

¹⁶⁵ See, e.g., *In re Kline*, 70 Ohio St. 25, 70 N.E. 511 (1904).

¹⁶⁶ Ch. 256, §§ 7-12, [1969] Wash. Laws 1st Ex. Sess. 2383.

¹⁶⁷ WASH. REV. CODE ANN. § 9.95.040 (Supp. 1971).

¹⁶⁸ In these states, the pardoning power usually is in the executive, subject to rules and regulations prescribed by the legislature. See, e.g., ALA. CONST. amend. 38; ARIZ. CONST. art. V, § 5; IOWA CONST. art. IV, § 16; KAN. CONST. art. I, § 7; N.M. CONST. art. V, § 6; ORE. CONST. art. V, § 14; WASH. CONST. art. III, § 9. See generally S. RUBIN, *supra* note 95, at 589-99 (discussing the origins, development, and limits upon the pardoning power).

¹⁶⁹ *In re Estrada*, 63 Cal. 2d 740, 753, 408 P.2d 948, 957, 48 Cal. Rptr. 172, 181 (1965) (Burke, J., dissenting).

State v. Tapp argued for a position giving all benefits whenever created, because "justice" demanded that the line of finalization be ignored, and that the court should

melt the lock and give the benefit of a lesser penalty . . . to anyone behind [the prison] door who has been subjected to a greater penalty,—no matter when the offense was committed or the sentence imposed¹⁷⁰

These two dissents raise a crucial question. It must be asked whether any intermediate line between the polar positions of "no benefit," and benefit even for those whose convictions are finalized, is so arbitrary as to be in violation of the equal protection clause of the Federal Constitution. Whenever this claim has been raised, however, it has not met with success.¹⁷¹

Judicial power to give ameliorative benefits therefore appears limited to the pre-finalized conviction stages, although the legislatures, through the various controls they may have on the pardoning and parole processes, may in some way extend the benefits of ameliorative changes to persons at any stage of the criminal justice process. Given that power, the remaining question is the legislative choice of who shall benefit.

VI. CONCLUSION

Consideration of the cases and statutes dealing with retroactive application of ameliorative criminal legislation reveals diverse and often perfunctory treatment of the questions presented. The entire area is dominated by general construction statutes, passed in response to injustices resulting from the interplay of the English common law and the American Constitution and often ignored by the legislatures in passing bills. As summarized by Justice Schaefer of the Illinois Supreme Court:

The common-law rule operated unsatisfactorily. . . . The reaction against the common-law rule took the form of generalized statements of legislative intention They produce their own anomalous results. When a newer social view decides that certain conduct is no longer to be punished, the general statute steps in and imposes the punishment fixed by an earlier generation. Yet if the legislature has taken the lesser step of reducing the punishment, the criminal has the benefit of the new policy. . . . [A] general construction statute . . . is at best the statement of a present legislature as to the intention of a future one. *It is so easy to show that the statute, when applicable, has often been overlooked by lawyers and judges that it is hard to believe that legislators have always*

¹⁷⁰ 26 Utah 2d 392, 398, 490 P.2d 334, 338 (1971) (Henriod, J., dissenting).

¹⁷¹ See, e.g., *Jones v. Cupp*, 452 F.2d 1091 (9th Cir. 1971).

*had it in mind. Without looking beyond our own borders, it is clear that here, at least, such a statute has not been an effective substitute for individualized statements of legislative purpose.*¹⁷²

It would appear that Justice Schaefer is correct. For legislative ignorance of the effect that general saving statutes will have upon ameliorative criminal legislation is perhaps the only way to justify the seemingly arbitrary decisions reached by the courts in this area.

Analysis of abatement cases initially reveals a desire of the courts to apply legislative intent where it can be found.¹⁷³ Yet it is impossible to find legislative intent when the legislature is totally unaware of the consequences of its actions. The general saving statute is incapable of responding to the myriad questions, in terms of purposes and goals, raised by changes in the criminal code.

A threshold question in terms of policy is the determination of the "collective legislative conscience" which fostered the passage of an ameliorative change in the criminal law. The courts are being presented with a difficult question of finding and implementing this "collective conscience." Yet when confronted with situations in which the evidence indicates that the legislature has ignored the terms of the previously passed general statutes, the courts are constrained either to apply a rule which they deem to be unjust or, in rare cases, to fashion a new rule which they believe expresses what the legislature would have wanted if it had considered the matter. This was the discomfort expressed by the *Tapp* court with the limits of the rule¹⁷⁴ and by the *Estrada* court in fashioning a new one.¹⁷⁵

Neither result is satisfactory. The only accurate source for legislative intent is, of course, the legislature itself. Legislative awareness and clear expression of any retroactive effect which it intends would appear the only way to give structure to a now confused area of law. In determining what retroactive effect, if any, an ameliorative change should have, the legislature should consider the type of change, why the change is being made, and the effect retroactivity or non-retroactivity would have upon the criminal justice system. These questions have complex answers which, when interrelated in determining a line of retroactivity, are subject to innumerable variations. A criminal statute might be repealed due to a present legislative determination that the conduct proscribed should never have been criminal,¹⁷⁶ that a change in societal

¹⁷² *People v. Bilderback*, 9 Ill. 2d 175, 181, 137 N.E.2d 389, 393 (1956) (emphasis added).

¹⁷³ See notes 20-28 *supra* & accompanying text.

¹⁷⁴ See text accompanying note 170 *supra*.

¹⁷⁵ See text accompanying notes 96-98, 169 *supra*.

¹⁷⁶ Repeal of prohibition by the 21st amendment is illustrative of such a change. Cf. note 6 *supra*.

mores demands that the conduct be decriminalized,¹⁷⁷ or that a sudden change in circumstances or conditions renders the proscription unnecessary.¹⁷⁸ In each of the cases, the prudence of retroactivity or non-retroactivity must be measured in terms of serving the possible goals of punishment: prevention, restraint, rehabilitation, deterrence, education, and retribution.¹⁷⁹ For example, if upon repeal of a law a determination that the proscribed conduct should never have been criminal can be attributed to the legislature, the "no benefit" rule clearly does not advance the goals of punishment. Prevention or particular deterrence is not served since the defendant cannot commit the same crime again once the conduct has been decriminalized. Further restraint is unnecessary to protect society from the now legalized conduct, and to the extent that rehabilitation is aimed at eliminating any predisposition to repeat the same criminal act, decriminalization completes rehabilitation. General deterrence is not fostered since decriminalization ends the need to dissuade others from committing the previously proscribed act.¹⁸⁰ Public education about the criminality of the act becomes anachronistic. The only remaining goal, retribution, is served by continued punishment, but is a generally discredited goal.¹⁸¹

This basic form of analysis similarly can be—and should legislatively be—applied to the reduction in penalty, reclassification, and redefinition of criminal responsibility situations according to the various rationales for the legislative change. The combinations of the variables under a four-dimensional matrix consisting of type of change, reason for change, stage at which retroactive relief would be available, and effect on the criminal justice system, are too numerous to explore in detail. Nor is it realistic to believe that any collection of legislators could agree upon specific reasons or upon potential effect. Yet it is entirely reasonable to believe that the "collective legislative conscience" will arrive at an appropriate line of retroactivity if consideration is focused upon the questions presented in the above analysis and applied to specific changes.

Several methods of expressing the line of retroactivity appear feas-

¹⁷⁷ The absolute decriminalization of abortions performed in New York by licensed physicians on women less than 24 weeks pregnant is such an example. Compare N.Y. PENAL LAW § 125.05 (McKinney Supp. 1972), with Act of July 20, 1965, ch. 1030, art. 125, [1965] N.Y. Acts 2386.

¹⁷⁸ This type of change is illustrated by the repeal of a variety of price controls at the end of World War II. See, e.g., *Bowen v. United States*, 171 F.2d 533 (5th Cir. 1948); *United States v. Carter*, 171 F.2d 530 (5th Cir. 1948).

¹⁷⁹ See W. LaFAVE & A. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 5, at 22-24 (1972).

¹⁸⁰ Of course, one possible objective of punishment may be the deterrence of law-breaking in general. Under this rationale, it is a disregard for law, and not a substantive offense, that is punished.

¹⁸¹ See, e.g., J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 10-11 (1940). Cf. note 95 *supra*.

ible. One method would abolish general saving statutes, and rely instead on an individualized legislative statement accompanying each ameliorative change. As a practical matter, this may create problems in securing passage of an ameliorative act since it will draw attention to the effect of the act upon past violators.¹⁸² Additionally, in the absence of a general saving statute, failure to include a statement indicating retroactive or non-retroactive intent would present a situation in which a court would have no standard other than common law abatement to apply in determining the application of the new statute. Another alternative is a more complicated type of general saving statute which would address specific types of legislative change and indicate the degree of retroactivity, if any, to be accorded each, unless, of course, a specific saving statute would otherwise direct.¹⁸³ The major problem to be resolved would be which line of retroactivity to provide. The unhappy experience under most of the current statutes undoubtedly should help in fashioning a workable rule. Full retroactivity would perhaps be the most appropriate line for such a statute, but in states in which the pardoning power is vested exclusively in the executive, such a line would not be possible, although special parole criteria could be separately legislated.¹⁸⁴ Any line which allows retroactive benefits short of full retroactivity, however, presents possible equal protection problems.¹⁸⁵ Where limits on legislative pardons exist, a finalization/non-finalization line is perhaps the most practical line, and would restore the common law abatement doctrine for ameliorative changes. A scheme such as this would reverse the present system of general saving statutes providing non-retroactivity and would eliminate the problems courts currently face when confronted with ameliorative changes.

¹⁸² See Ruud, *supra* note 50, at 309.

¹⁸³ Cf. note 127 *supra* & accompanying text.

¹⁸⁴ For further discussion of parole criteria, see Comment, *The Parole System*, 120 U. PA. L. REV. 282, 304-05, 367-71 (1971). Parole is, of course, within the control of the legislatures. See *id.* 367 & n.550; S. RUBIN, *supra* note 95, at 549.

¹⁸⁵ See note 171 *supra* & accompanying text.

Currently, all jurisdictions other than those applying the "no benefit" rule, see notes 101-05 *supra* & accompanying text, may treat differently people who commit identical acts on the same day. The crucial question in any equal protection argument would be "whether there is some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972), of persons who commit the same act on the same day but who are apprehended or convicted, or who exhaust their final direct appeals on different days. It must therefore be determined whether the benefit line is drawn at a place which is rationally related to a valid public purpose and which has a fair and substantial relation to the objectives of the general saving legislation, or, if liberty is a "fundamental freedom," whether that distinction is necessary to the achievement of a compelling state interest. *Id.* at 447 n.7; see *Shapiro v. Thompson*, 394 U.S. 618 (1969). It is unclear where the appropriate constitutional line should be drawn, but, for example, it would appear that a state's interest in imposing a harsher penalty after an ameliorative legislative change is less compelling than its desire not to retry someone who has been incarcerated for a number of years, and it appears that at least some courts may be receptive to an equal protection attack against the "intermediate" positions on sentence mitigation. See *Dortch v. State*, 142 Conn. 18, 110 A.2d 471 (1954); cf. notes 116-19 *supra* & accompanying text. For further bases for an equal protection argument, see Note, 18 WAYNE L. REV. 1157, 1168-69 (1972).

While none of the proposed solutions may be fully satisfactory, each would improve the current situation of confusion which has prompted some courts to ignore the general statutes to give effect to what they view as the "correct" legislative intent, however different it may be from the statutory formulation, while other courts rigidly adhere to the terms of identical statutory formulae which almost certainly do not reflect true legislative intent in all cases. Legislative re-examination of saving statutes is clearly overdue; past failures need no longer be preserved.